Fortunato, Gavlord, Astuto v. COBA, 33 OCB 23 (BCB 1984) [Decision No. B-23-84 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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C.O. FRANK FORTUNATO, 4160
C.O. GERARD GAYLORD, 2446
C.O. SIMON ASTUTO, 4585,

DECISION NO. B-23-84
Petitioners, DOCKET NO. BCB-720-84

-against-

CORRECTION OFFICERS BENEVOLENT ASSOCIATION, INC., AND C.O. PHILLIP SEELIG (President of C.O.B.A., Inc.).

Respondents.
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DECISION AND ORDER

A verified improper practice petition was filed by the petitioners[1] on July 20, 1984, in which it is alleged that the Correction Officers Benevolent Association, Inc. (here inafter "COBA" or "the Union") and its President, Phillip Seelig, committed acts constituting improper practices as defined in Sections 1173-4.1 and 1173-4.2 of the New York City Collective Bargaining Law (hereinafter "NYCCBL")The respondents submitted a verified[2] answer on August 3, 1984.

[1] In addition to the three petitioners named in the caption of this proceeding, individual verifications of the petition were submitted by 211 Correction Officers as additional petitioners herein.

[2] Notwithstanding the petitioners attorney s allegation that the copy of the answer lie received was not verified, the original answer filed with the Office of Collective Bargaining included a proper verification signed and sworn to by respondent Seelig.

The petitioners' attorney filed a reply affirmation on August 20, 1984.

BACKGROUND

On October 20, 1982, a regular meeting of the membership of COBA was held. In the course of that meeting, an amendment to the Union's Constitution and By-Laws purportedly was passed which had the effect of changing the term of office of the Union's elected officers from two years to four years. The petitioners allege that the procedure under which this amendment was adopted failed to comply with the specific and express requirements of the Constitution and By-Laws.[3]

The petitioners also allege that a written statement of charges of "misconduct of office", dated October 28, 1983, was filed by two of the petitioners, pursuant to Article IX of the Constitution and By-Laws. This statement charges four of COBA's elected officers with acts of nonfeasance, malfeasance, and other misconduct. A follow-up letter,

[3] The petitioners assert that the proposed amendment was not subscribed by ten members, was not read at at least one regular meeting prior to the one at which action was taken, and was not posted at all departmental institutions at least five days prior to the date of the vote, as required by Article XIII of the Constitution and By-Laws. The petitioners further allege that the actual number of people attending the meeting at which the vote was taken was not recorded, and no one ascertained whether the people voting were eligible members of the Union.

dated March 5, 1984, and signed by 24 Correction Officers, demanded a hearing on the previously-filed charges, as provided for in the Constitution and By-Laws. The petitioners assert that no such hearing has been had, and the officers of the Union have continued to ignore the charges.

POSITIONS OF THE PARTIES

Petitioners' Position

The petitioners contend that the acts complained of above constitute a breach of the duty of fair representation by the Union and its officers. They allege that these acts have materially affected the terms and conditions of employment of the petitioners, and have further had a severe negative effect on the nature of the representation provided by the respondents. The petitioners submit that the Union's actions have adversely affected the rights of fair representation owed by the respondent to employees as members of a bargaining unit.

Specifically, the petitioners argue that COBA has breached its duty of fair representation by "wrongfully and illegally" extending the terms of the Union's officers from two years to four years, thereby depriving union members of their right to vote and their right to remove unwanted officers every two years.

The petitioners further allege that their improper practice charge is not untimely, inasmuch as the deprivation of the right to vote and the failure to act on the charges of misconduct in office are ongoing and presently affect the petitioners as well as all other Correction Officers similarly situated. Accordingly, the petitioners submit that this proceeding is not barred by any statute of limitations.

Finally, the petitioners contend that they should not be required to exhaust any available remedies under the Union Constitution and By-Laws before resorting to the present forum. They note that previous charges and grievances filed under the Constitution and By-Laws by the petitioners have been thwarted by the respondents' failure to act on such charges and grievances. The' petitioners submit that resort to the Union's internal grievance machinery would be time consuming and ultimately futile, and therefore should not be required.

For these reasons, the petitioners request that the respondents be found to have committed an improper practice, that the amendment changing the officers' term of office be declared null and void, and that other appropriate relief be granted.

Respondents' Position

Respondents COBA and its President, Phillip Seelig, deny that they have committed any improper practice. While they admit that an amendment was adopted extending the Union officers' terms from two years to four years, they deny that any duty of fair representation is affected by such action. They further allege that the petitioners' charges of misconduct are vague, unspecified, and unsupported.

The respondents submit that the improper practice petition should be dismissed on several grounds. Firstly, they assert that the petition fails to allege facts sufficient to establish a cause of action for breach of the duty of fair representation. The Union contends that no petitioner has alleged facts showing that the Union has failed to perform its duty of fair representation.

Secondly, COBA claims that the petition is barred by the four month 'statute of limitations contained in §7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining (hereinafter "OCB Rules") . In this regard, the Union argues that the acts alleged in the petition should not be considered "ongoing" for purposes of tolling the statute of limitations.

Thirdly, the Union asserts that the Board lacks jurisdiction to hear the claim herein. The respondents contend that the matters complained of by the petitioners involve only internal union affairs and create no impact on the petitioners' employment. The respondents urge that based on prior Board precedent, the Board lacks jurisdiction over disputes involving internal union affairs.

Lastly, the Union contends that the petitioners have failed to exhaust their internal union remedies. It alleges that the petitioners must be required to exhaust their remedies under the Union's Constitution and By-Laws before seeking redress from a tribunal outside of the Union.

For these reasons, the respondents request that the petition be dismissed in its entirety.

DISCUSSION

In this case, the respondents have alleged several independent bases for seeking dismissal of the improper practice petition without reaching the merits of the petitioners' claims. We will examine first the issue raised concerning this Board's jurisdiction over the subject matter of these claims, for if we lack jurisdiction, we may proceed no further.

COBA asserts that the allegations of the improper practice petition involve only internal union affairs, a subject matter over which this Board generally lacks jurisdiction.[4] However, the petitioners deny that this is merely an internal union matter; rather, they contend that their petition raises a claim that the Union has breached its duty of fair representation, a subject matter which clearly is within the scope of this Board's juris diction under the NYCCBL.[5]

We have reviewed the petitioner's allegations of a breach of the duty of fair representation, and find them to be conclusory and unsupported by factual allegations sufficient to state a cause of action. The only facts offered in support of this claim relate to the fact that the respondents' actions have permitted the incumbent officers of COBA to remain in their positions an additional two years, thereby allegedly depriving members of the Union of the opportunity to displace these officers at an election held in accordance with the original provisions

[4] Decision Nos. B-1-81; B-18-79; B-1-79.

[5] Decision Nos. B-14-83; B-39-82; B-11-82; B-26-81 B-13-81; B-16-79.

of the Union's Constitution and By-Laws. Assuming these allegations to be true, we'do not find that they implicate the duty of fair representation. We believe that the petitioners' contention as to the nature of their claim is based upon a misconception of the scope of the duty of fair representation.

The United States Supreme Court, in defining the scope of the duty of fair representation, has stated that when Congress empowered unions to bargain exclusively for all employees in a bargaining unit, thereby subordinating individual interests to the interests of the unit as a whole, it simultaneously imposed on unions a correlative duty "inseparable from the power of representation to If exercise that power fairly." [6] The fair representation doctrine thus serves as a counterbalance to a union's clusive authority: since exclusive representation reduces the individual rights of employees, the doctrine protects "individuals stripped of traditional forms of redress by the provisions of the. . . labor law."[7]

[6] Steele v. Louisville and Nashville Railroad, 323 U.S. 192, 15 LRRM 708 (1944).

[7] Vaca v. Sipes, 386 U.S. 171, 182 (1967).

Pursuant to the doctrine, as it has been applied by the courts, a union must represent fairly the interests of all bargaining unit members with respect to the negotiation, administration, and enforcement of collective bargaining agreements.[8] The petitioners' claim implies that the duty of fair representation further extends to the Union's internal administration of its own Constitution and By-Laws. No cases have been cited in support of this proposition. We do not find that such an extension of this duty is justified.

We believe that the duty of fair representation is coextensive with a union's exclusive authority to deal with the employer on behalf of the bargaining unit employees with respect to certain matters. To the extent that a union I s status as exclusive collective bargaining representative extinguishes an individual employee's access to available remedies, such as negotiation with the employer, the union owes a duty to represent fairly the interest of the employee who is unable to act independently to protect his own interests. In the context of a certified employee representative's exclusive authority under the NYCCBL and

[8] International Brotherhood of Electrical Workers v. Foust, 442 U.S. 32 (197)see Decision -Nos. B-14-83; B-16-79.

the applicable provisions of the Taylor Law, the duty of fair representation does not reach into and control all aspects of the Union's relationship with its members. The duty extends only to the negotiation, administration, and enforcement of a collective bargaining agreement.[9]

We therefore hold that in the absence of a factual showing that the union's internal acts actually affect an employee's relationship with the employer (i.e., the employee's terms and conditions of employment), the duty of fair representation does not extend to the internal affairs of the union.[10]

We find that the petitioners' allegations of impact on terms and conditions of employment and upon the nature of the representation provided by COBA are entirely conclusory and are unsupported by allegations of relevant fact. Accordingly, we will dismiss the petitioners' duty of fair representation claim for failure to state a cause of action.

It is apparent that the petitioners' claim, in reality, is based upon what they view as an unjust and undemocratic

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[9] Decision No. B-14-83.

[10] Decision No. B-1-79; CSEA and Bogack, 9 PERB ¶3064 (1976); UFT and Dembicer, 9 PERB ¶3018 (1976).

violation by the Union of its own Constitution and By-Laws. While this is manifestly an internal union matter, an area which we heretofore have found to be outside our statutorv jurisdiction,[11] we take this opportunity to review the scope of our authority under the NYCCBL and the Taylor Law [12] in this area.

Section 1173-4.2 of the NYCCBL does not, on its face, purport to regulate internal union affairs. It does proscribe certain acts which constitute improper practices, including, in subsection b., improper public employee organization practices. However, no reference is made to internal union procedures or election practices. Therefore, we look to other sources to determine whether, notwithstanding the absence of specific reference to internal union conduct, such conduct was nevertheless meant to be included within the purview of §1173-4.2 of the NYCCBL. [13]

The enactment of the NYCCBL was authorized by §212 of the Taylor Law, which permits local governments to adopt provisions and procedures which are substituted for certain

[11] Decision Nos. B-1-81; B-18-79; B-1-79.

[12] Civil Service Law, Article 14.

[13] Decision No. B-1-79.

provisions of the Taylor Law, provided that they are substantially equivalent thereto. This Board's application of the improper practice provisions contained in §1173-4.2 of the NYCCBL is expressly authoriLed in §205.5(d) of the Taylor Law, subject to review by the State Public Employment Relations Board ("PERB") on questions of law. it seems clear that the State Legislature has made a finding, inherently expressed in §205.5(d) of the Taylor Law, that NYCCBL §1173-4.2 is substantially equivalent to the improper practice provisions of §209-a of the Taylor Law. In addition, the Legislature has provided a review mechanism to insure that the continuing implementation of §1173-4.2 by this Board is substantially equivalent to PERB's administration of §209-a.

Based upon this relationship between the NYCCBL and the Taylor Law, we have stated that we should be guided by available and relevant interpretations of the improper practice provisions of §209-a of the Taylor Law as well as by our own views as to the administration of the NYCCBL.[14]

While this Board has been presented with relatively few cases involving internal union affairs,[15] the PERB

[14] Decision No. B-1-79.

[15] Decision Nos. B-1-81; B-18-79; B-1-79.

has been required to rule on numerous cases involving this subject.

In Board of Education, City of Syracuse School District, Syracuse Teachers Association and Willey,[16] a case of first impression under the Taylor Law, the Hearing Officer reviewed the legislative history of the Taylor Law and ruled that:

> "[T]he Taylor Law was clearly designed by the Governor's Committee and by the Legislature to protect only employee rights-to organize and to be represented in the determination of their employment conditions-and was not meant to control or regulate the internal relationship between organizations and their members."[17]

On this basis, the Hearing Officer dismissed charges of interference with the petitioner's involvement in an internal union election campaign. The Hearing Officer's determination was not appealed to the Board.

A. similar ruling by another Hearing officer was affirmed by PERB in United Federation of Teachers and Dembicer.[18] The Board noted that the improper practice charges, relating to the petitioner's expulsion from an internal union committee,

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[16] 7 PERB IR4539 (1974).

[17] 7 PERB at 4627.

[18] 9 PERB 913018 (1976), aff1g 8 PERB 914547 (1975)

contained

> " ... no claim that UFT ever failed to properly represent [petitioner] in any matter involving his terms and conditions of employment." [19]

The Board concluded that it had no jurisdiction, and dismissed the charge.

In Civil Service Employees Association and Bogack [20] the charge involved a union's discipline of a member for actions in support of a rival union. In affirming the decision of its Director of Public Employment Practices and Representation which dismissed the charge for lack of jurisdiction, PERB endorsed the Director's finding that:

> "[Tlhe action taken by CSEA related to its internal affairs and that this Board is not the forum to regulate the internal affairs of an employee organization."[21]

The Board also noted that the petitioner alleged that the union's actions were violative of the union's constitution and by-laws. PERB refused to consider or determine these contentions, stating that the petitioner could test the validity of such contentions in a plenary court action.[22]

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[19] 9 PERB at 3033, fn. 2.

[20] 9 PERB ¶3064 (1976), aff1g 9 PERB ¶4520.

[21] 9 PERB at 3110.

[22] Id.

In a case involving the petitioner's expulsion from union membership, Lucheso and Deputy Sheriff's Benevolent Association of Onondaga County,[23] the PERB Hearing Officer reaffirmed that PERB has no jurisdiction over internal union affairs-which do not affect either the individual's terms and conditions of employment or the representation owed to the individual by the union with respect to his employment. The Hearing officer further observed that the Governor's Committee on Public Employee Relations (known as the Taylor Committee), in its Interim Report, dated June 17, 1968, recognized the Board's lack of jurisdiction in this area and suggested further study of this subject.[24]

The above expressions of PERB's lack of jurisdiction in this area have been followed consistently in recent cases.[25] However, PERB has held that its jurisdiction is properly invoked when a union's internal rules or actions intrude upon the fundamental purposes or policies of the Taylor Law

Thus, in Captain's Endowment Association and Mallory,[26]

[23] 11 PERB ¶4589 (1978)

[24] 11 PERB at 4698, fn. 2.

[25] CSEA and Michael, 13 PERB ¶4523 (1980); PBA of Newburgh and Wohlrab? 14 PERB ¶4632 (1981); CSEA and Liebler, 17 PERB ¶4568 (1984).

[26] 15 PERB 13019 (1982).

PERB asserted its jurisdiction and found an improper practice had been committed when the union attempted to fine an employee for resigning from the union. PERB held that the union's action infringed upon the employee's right, under §202 of the Taylor Law, to refrain from joining or participating in any employee organization.

Similarly, in Council of Supervisors and Administrators and Marston,[27] PERB asserted its jurisdiction and found an improper practice where the union conditioned membership on the applicant's payment of agency fees owing from a period when the deduction of such fees was suspended because of the union's involvement in an unlawful strike. The Board held that the union's actions conflicted with the Taylor Law's provision that a union may not collect agency shop fees during a period when its dues check-off rights have been suspended.

In our own prior decisions in this area, this Board has applied essentially the same standard utilized by PERB We have held that we lack jurisdiction under the NYCCBL in cases involving internal union affairs, where the union conduct does not affect the employee's terms and conditions

[27] 17 PERB 913002 (1984).

of employment and has no effect on the nature of the representation accorded to the employee by the union with respect to his employment.[28] We adhere to this standard in the present case.

In the instant matter, the petitioners have alleged that COBA's acts have materially affected their terms and conditions of employment and have had a severe negative effect on the nature of the representation provided by the union. As discussed supra, in connection with our consideration of petitioners' duty of fair representation claim, we find these assertions to be conclusory and unsupported by factual allegations. The petitioners fail to give a single example of how their terms and conditions of employment have been affected by the extension of the Union officers' terms of office. They similarly fail to cite a single example of how the Union's representation with respect to their employment has proven to be inadequate, as a consequence of the extended terms of office. Therefore, the matters complained of must be deemed to be internal union affairs which are not within the scope of this Board's jurisdiction under the NYCCBL. Accordingly, the petitioners'

[28] Decision Nos. B-1-81; B-18-79; B-1-79.

allegations concerning the adoption of the amendment extending the terms of office, even if deemed true, cannot constitute an improper practice under NYCCBL §1173-4.2.

We have noted in past decisions that remedies for internal union disputes are to be sought in the courts.[29] In the present case, the petitioners claim that the respondents' actions were violative of the Union's Constitution and By-Laws. It is clear that the courts of New York have asserted jurisdiction over such claims.[30] We have not considered the merits of this claim, and our dismissal of the petition herein is without prejudice to the consideration of that issue in any other forum.

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[29] Decision Nos. B-18-79 at 8, fn. 4; B-1-79 at 8.

[30] Allen v. New York City Transit Authority , 109 Misc. 2d 178, 439 N.Y.S. 2d 811, 815 (Sup. Ct., Kings Co., 1981); Blair v. Local 100, Transport Workers Union, 106 Misc. 2d 1018, 436 N.Y.S. 2d 912, 914 (Sup. Ct., Queens Co., 1980); Watkins v. Clark, 85 Misc. 2d 727, 380 N.Y.S. 2d 604, 608 (Sup. Ct., Rockland Co., 1976); Caliendo v. McFarland 13 Misc. 2d 183, 175 N.Y.S. 2d 869, 875 (Sup. Ct., N.Y. Co., 1958); see Balas v. McKiernan, 41 A.D. 2d 131, 341, N.Y.S. 2d 520, 522 (2d Dept. 1973).

ORDER

Pursuant to the power vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED that the petition herein be, and the same hereby is, dismissed for lack of jurisdiction.

Dated: New York, N.Y.
October 25, 1984

ARVID ANDERSON
CHAIRMAN

MILTON FRIEDMAN
MEMBER

DANIEL G. COLLINS
MEMBER

DEAN L. SILVERBERG
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER